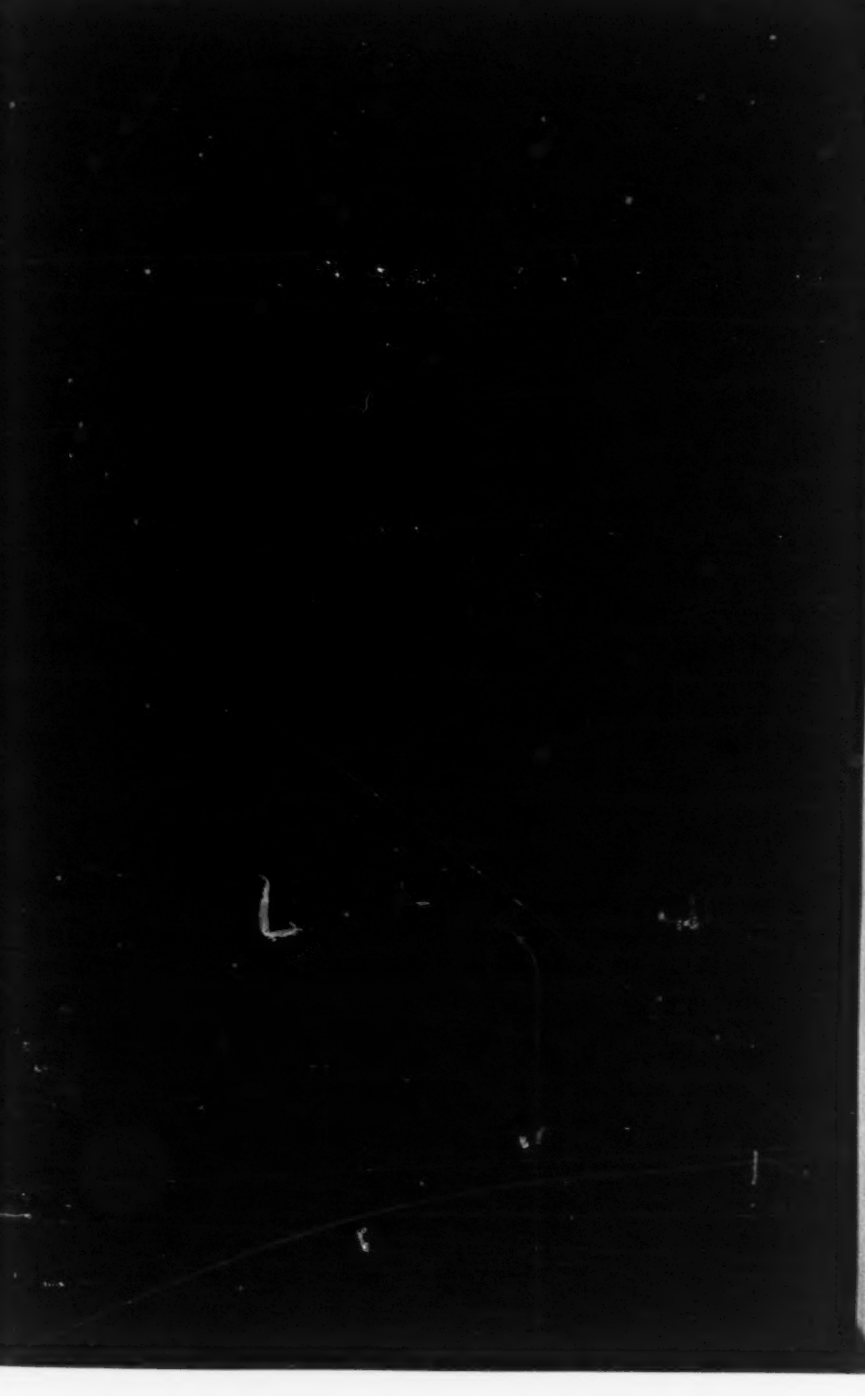

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 106

UNION PAVING COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 30–35) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1946 (R. 35). A motion for a new trial, filed by petitioner on February 3, 1947,[1] was overruled on March 3, 1947 (R. 35).

[1] Court of Claims Rule 91 permits the filing of a motion for a new trial within 60 days of that court's judgment. As shown by the record herein, petitioner's motion for a new trial was filed 63 days after the entry of judgment (R. 35). Since the time within which to petition for a writ of cer-

The petition for a writ of certiorari was filed on May 26, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether a construction contractor under a standard form government contract may recover damages against the Government where the alleged breach arises out of the disputed meaning of the contract specifications which were interpreted adversely to the contractor's position by the Government's contracting officer acting properly within the scope of his authority under the contract, and where the contractor failed to take an appeal from the determination in accordance with the standard Article 15 appeal procedure.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract and the specifications involved are set out in the Appendix, *infra*, pp. 12–15.

STATEMENT

On October 13, 1942, the Civil Aeronautics Administration, through Proposal 1–43–261 (Appendix, *infra*, pp. 12–13), invited bids for the

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tiorari may be tolled only by a seasonable motion for a new trial or petition for rehearing (*Morse* v. *United States*, 270 U. S. 151; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498), we suggest that petitioner's time for applying for certiorari herein expired on March 2, 1947.

paving of runways, taxiways and apron strips for the Atlantic City, New Jersey, Municipal Airport (R. 18–19). This proposal provided that work was to be in accordance with the specifications, drawings and special provisions attached thereto (R. 19). Schedule III of Proposals 1–43–261, Item 102 contained the following specification (R. 19):

> Concrete pavement, plain—cement content per cubic yard of concrete to be 6.0 bags (approximate), 6″ section with thickened edges, to be constructed one or two lanes at a time in accordance with Specification P–501 and drawing 1–E–803, including necessary fine grading, preparation of subgrade in accordance with Specification P–103 and the furnishing of *High Early* strength *Portland cement,* aggregates, and all materials complete in place for finished pavement.

Pursuant to this proposal, petitioner, on October 27, 1942, entered into contract Clca–1579 with the United States to perform the paving above described (R. 18) at the contract price of $1,076,779.00 (R. 20). Article 1 of the contract (Appendix, *infra,* p. 13) stated that construction was to be in accordance with the specifications, schedules and drawings made a part thereof; that it was to commence within 10 calendar days after receipt of notice to proceed; and that it was to be completed within 130 calendar days thereafter (R. 20).

Paragraph 3/5 of Specification P–501 (Appendix, *infra*, pp. 13–14) contained specifications for three types of concrete, classified as "Class A," "Class B," and "Class C" (R. 23). "Class A" was parenthetically described as "For Use Where Severe Climatic Conditions Prevail" and prescribed a cement content of 6 bags per cubic yard of concrete using the standard method of placement; "Class B" was parenthetically described as "For Use Where Moderate Climatic Conditions Prevail" and prescribed a cement content of 5.5 bags per cubic yard of concrete using the standard method of placement; "Class C" was parenthetically described as "For Use Where Mild Climatic Conditions Prevail" and prescribed a cement content of 5 bags per cubic yard of concrete (R. 23). This paragraph further provided that within certain limits the cement content of each batch could be varied in order to insure the use of the least amount of fine aggregate which would produce workable concrete within the specified slump range (R. 24).

Paragraph A9 of the Special Proposal Conditions attached to the contract (Appendix, *infra*, pp. 14–15) specified that on all questions relating to the proper execution of the work and the interpretation of the specifications, the decision of the contracting officer should be final, subject to appeal as provided for in the contract (R. 25). Article 15 of the contract (Appendix, *infra*, p. 15) permitted an appeal from the decision of the

contracting officer to the head of the department concerned if made in writing within thirty days (R. 21).

At the time petitioner was ready to begin laying concrete, its vice-president verbally informed the Government engineer that he considered Atlantic City to have a mild climate, and that, accordingly, petitioner intended to pour "Class C" concrete. Petitioner was informed that the Government intended to specify "Class A" concrete pursuant to the contract provisions. Subsequently, by letter of February 24, 1943, the contracting officer informed petitioner that six bags of cement per cubic yard of concrete would be required in accordance with the provisions for "Class A" concrete contained in Specification P–501 (Appendix, *infra,* pp. 13–14). (R. 26.) On March 16, 1943 petitioners replied to this letter and stated that it was proceeding to mix "Class A" concrete, although it took an exception to the contracting officer's interpretation of the specifications (R. 27). No appeal to the head of the department was taken from the decision of the contracting officer of February 24, 1943 (R. 27).

Petitioner performed the contract and was paid the contract price (R. 26). Following acceptance of the work, petitioner submitted a claim for extra compensation in the sum of $42,875.16 which represented the difference in cost between "Class A" and "Class C" concrete (R. 27). In support

of this claim petitioner asserted that the climate of Atlantic City was mild and that hence, the contract specifications (Specification P–501) merely called for "Class C" concrete (R. 27–28). This claim was denied by the contracting officer by letter dated March 13, 1944, in which petitioner was informed that Specification P–501 was designed for general use in connection with airport construction work; that in any given proposal invitation it remained for the Government to specify the cement content desired per cubic yard of concrete; that the contemplated purpose for which an airport is to be used would dictate the requirements in any given instance since it would determine the compressive strength required; and that therefore the climatic conditions would not necessarily be the determining factor on which the Government would base its cement content stipulation (R. 28). On April 5, 1944 petitioner appealed from this determination to the Civil Aeronautics Administration; this claim was denied on July 7, 1944 (R. 29).

Thereupon, petitioner instituted suit in the Court of Claims to recover the difference in cost between "Class A" and "Class C" concrete (R. 1–5). That court held that the decision of the contracting officer in specifying "Class A" concrete was not arbitrary or capricious, and that Paragraph 3/5 of Specification P–501 was not intended to let the contractor decide upon which

type of concrete to use (R. 30, 33). Accordingly, it dismissed the petition (R. 35).

ARGUMENT

Petitioner seeks to recover the difference between the cost of "Class A" concrete, which it was required to lay, and the cost of "Class C" concrete, which, it asserts, was permitted by the specifications. In support of this claim, petitioner asserts that the contracting officer's interpretation of the specifications was arbitrary and capricious; that in effect it required the performance of extra work not contemplated by the contract; and that, in these circumstances, the provisions in the contract requiring the contractor to appeal adverse decisions to the head of the department within 30 days had no application to this controversy (Pet. 14–15). We submit that petitioner's claim is wholly without substance, and that, under the pertinent decisions of this Court, petitioner's failure to pursue the administrative remedy provided by the contract, constitutes a complete bar to the claim.

1. As stated by the court below, a reading of Specification P–501, which sets forth the three classes of paving concrete, clearly shows that it was general in nature, and that it was intended to permit the contracting officer to select the particular type of concrete with reference to the requirements of the particular job (R. 33). The

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contemplated purpose for which the airport was to be used would necessarily dictate the amount of cement required since it would determine the compressive strength of the concrete. Certainly petitioner could not reasonably conclude that by Specification P–501 it was granted an option to select "Class A," "Class B," or "Class C" concrete in accordance with its own views as to whether or not the class selected was suitable for the location in which the work was to be done. Accordingly, we submit that the court below was clearly correct in holding that the ruling of contracting officer to the effect that "Class A" concrete would be required was neither arbitrary nor capricious nor so grossly erroneous as to imply bad faith (R. 35).[2]

2. Even assuming, *arguendo*, that petitioner's allegations to the effect that the contracting officer's interpretation of the specifications was arbitrary and unreasonable, it is well settled that petitioner cannot succeed in this suit. Article 15 of the standard form contract herein provides

[2] There is no merit to petitioner's argument that since the specifications called for the use of "6.0 bags (approximate)" Class A, B, or C concrete could have been used (Pet. 13). As petitioner well knows, and the proof shows (R. 33), it is not always possible to get in every mix of concrete just exactly the amount of cement specified. The word "approximately" was inserted in the proposal to place all bidders on notice that they must maintain the water-cement ratio specified (R. 33); it was not inserted to leave it indefinite whether 5 bags of cement (Class C), or 5½ bags (Class B) or 6 bags (Class A) should be used (R. 33).

that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto" (R. 21). Paragraph A9 of the Special Proposal Conditions attached to the contract provided that "On all questions relating to the acceptability of material, classification of material, proper execution of the work, and the interpretation of the specifications, the decision of the Contracting Officer shall be final, subject to appeal as provided for in Article 15 of the contract" (R. 25).

In this case petitioner, after the contract had been signed, informed the Government that it considered Atlantic City to have a mild climate and therefore it expected to lay "Class C" concrete. It was informed by the contracting officer that "Class A" concrete would be required. Although petitioner took exception to this ruling, it did not appeal to the head of the department concerned but went ahead and laid "Class A" concrete as directed. As stated by the court below, "* * * It was not until after all the work had been done that it appealed to the head of the department from the contracting officer's denial of its claim for the difference in cost. The time for it to have appealed from the contracting officer's ruling requiring Class A concrete

was when that ruling was made, and not after the work had been done" (R. 34–35).

Petitioner thus chose not to follow "the only avenue for relief", *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61, available for the settlement of disputes arising under the contract.[3] *United States* v. *Blair*, 321 U. S. 730, 735. Article 15 of the contract set forth the administrative procedure for the parties to follow, and provided a complete and reasonable means of correcting the alleged misinterpretation of the specifications. Moreover, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting the errors of its subordinate officers. "Having accepted and agreed to these provisions, [petitioner] was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be

[3] As set forth above, *supra*, pp. 5–6, petitioner filed a claim with the contracting officer for extra compensation after the completion of work. From a denial of this claim, petitioner took an "appeal" to the Civil Aeronautics Administration. This claim and appeal did not, of course, constitute any compliance with Article 15. Article 15 procedure is not intended to provide contractors with an administrative method of collecting money. On the contrary, the standard form contract review procedure is specifically designed to afford to the United States an opportunity to avoid such money claims which may arise from mistaken decisions by contracting officers. *United States* v. *Blair*, *supra*, at p. 735. Here, the decision properly appealable under Article 15 was that made by the contracting officer on February 24, 1943, with regard to the cement content of the concrete.

so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims." *Id.* p. 735. See *United States* v. *Holpuch,* 328 U. S. 234, 243.

CONCLUSION

The decision of the Court of Claims is clearly correct and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
PEYTON FORD,
Assistant Attorney General.
SAMUEL D. SLADE,
EMERY COX, JR.,
Attorneys.

JULY 1947.

APPENDIX

Proposal 1-43-261 provided in part:

> This proposal is No 1-43-261 and requests for complete proposal should mention that number. The proposal with drawings, specifications, etc., can be obtained from the Regional Manager, First Region, Department of Commerce, Civil Aeronautics Administration, C. A. A. Building, LaGuardia Field, New York, N. Y.
>
> * * * * *
>
> The work is to be in accordance with applicable specifications and drawings attached hereto, the special provisions of this proposal, and in accordance with the following specifications and drawings:
>
> Specification ..... See Exhibit "C" attached.
> Drawings ..... See Exhibit "C" attached.

The "special provision of this proposal" pertinent to the issue is the following portion of schedule III:

> Concrete pavement, plain—cement content per cubic yard of concrete to be 6.0 bags (approximate), 6" section with thickened edges, to be constructed one or two lanes at a time in accordance with Specification P-501 and drawing 1-E-803, including necessary fine grading, preparation of subgrade in accordance with Specification P-103 and the furnishing of *High Early* strength *Portland cement,* aggregates, and all materials complete in place for finished pavement.

Exhibit "C" referred to above reads as follows:

(DRAWINGS LONGER THAN 8½ x 11—BOUND SEPARATELY)

Dwg. No.	Revised Date	Title
1-E-802	10-13-42	Master Plan Lay-out.
1-E-803	10-13-42	Paving Plan.
1-E-804	10-13-42	Concrete Runway Details.

SPECIFICATIONS

P-101	8-1-41	Airport Grading.
P-103	8-1-41	Preparation of Subgrade for Airport Runways, Taxiways and Aprons.
1-220	6-16-42	Sand, Gravel Sub-base for Airport Paving.
P-501	7-1-42	Portland Cement Concrete Pavement for Airport Runways, Taxiways, and Aprons.

Article 1 of the contract provided:

> Article 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for the paving of runways, taxiways and apron strips at the Atlantic City, New Jersey Municipal Airport, located in Atlantic County, New Jersey, in accordance with Schedule III of Proposal No. 1–43–261 for the consideration of the estimated amount of One Million Seventy-six Thousand Seven Hundred Seventy-nine ($1,076,779.00) Dollars, the Contractor to be paid for actual quantities at the unit prices quoted in Schedule III of Proposal No. 1–43–261 in strict accordance with the specification, schedules, and drawings, all of which are made a part hereof and designated as follows: Bid on Proposal No. 1–43–261, including the specifications and drawings specified therein and attached hereto.
>
> The work shall be commenced within ten (10) calendar days from the effective date of notice to proceed and shall be completed within one hundred thirty (130) calendar days from the effective date of notice *of* proceed.

Paragraph 3/5 of Specification P–501 read in part as follows:

3/5 Proportions.—The weights of fine and coarse aggregate and the quantity of water per bag of cement shall be determined by the engineer from the weights given in the tables with the net amount of water (including free water in the aggregates) as shown and the range in slump as stated.

CLASS A PAVING CONCRETE

Maximum Net Water Content 5½ Gallons Per Bag of Cement (For Use Where Severe Climatic Conditions Prevail)

Type of Coarse Aggregate	*Weights in Pounds of Dry Aggregates per Bag of Cement*			*Cement Content per Cu. Yd. of Concrete*	*Slump Range, Inches*
	Fine Aggregate	*Coarse Aggregate*	*Total*		
Standard Method of Placement					
Gravel	188	349	537	6 bags	2–3
*	*	*	*	*	*

CLASS B PAVING CONCRETE

Maximum Net Water Content 6 Gallons Per Bag of Cement (For Use Where Moderate Climatic Conditions Prevail)

*	*	*	*	*	
dard Method of Placement					
Gravel	208	385	593	5.5 bags	2–3
*	*	*	*	*	

CLASS C PAVING CONCRETE

Maximum Net Water Content 6½ Gallons Per Bag of Cement (For Use Where Mild Climatic Conditions Prevail)

*	*	*	*	*	
Standard Method of Placement					
Gravel	232	431	663	5 bags	2–3

Paragraph A–9 of the Special Proposal Conditions, provided:

A9. *Interpretation of specifications.*—On all questions relating to the acceptability of

material, classification of material, proper execution of the work, and the interpretation of the specifications, the decision of the Contracting Officer shall be final, subject to appeal as provided for in Article 15 of the contract.

Article 15 of the contract provided:

> Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

U. S. GOVERNMENT PRINTING OFFICE: 1947